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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

SHINCHOSHA COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

and

SHIGETO SHIMIZU,
Respondents.

PETITIONER'S REPLY BRIEF SUPPORTING ITS PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Without conceding the accuracy of any of the arguments made by respondent Shigeto Shimizu ("Mr. Shimizu") in his Opposition to the Petition for Certiorari, Petitioner Shinchosha Company ("Shinchosha") submits this Reply Brief in accordance with the limits imposed by Supreme Court Rule 15(6) and addresses only those arguments "first raised in the brief in opposition." We address especially the adequacy of the record below, the relevance to this case of *Asahi Metal Industries v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), the appropriate standard of

review, and the necessity of review at this stage in the litigation.

ARGUMENT

I.

The Record From The Superior Court Provides The Required Basis For Deciding The Issues Raised By This Case.

Mr. Shimizu's suggestion that review of the Superior Court's decision is not possible because "the facts are not fully developed" ignores the record below.[1]

Shinchosha has introduced uncontroverted evidence that (1) the sole authorized means by which *Focus* is distributed is through sixteen independent distribution companies (Declaration of Susumu Umeda, Deputy Director of Shinchosha's Business Department, attached to Shinchosha's Reply Brief Supporting Motion to Quash, ¶3), (2) that only three of those companies send any *Focus* magazines outside of Japan and that those three send no more than 40 of the 600,000 issues published per week of *Focus* magazine to California (*Id.*), and (3) that Shinchosha neither authorizes nor controls the distribution of any of its publications outside of Japan nor retains

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[1]Mr. Shimizu contends that Shinchosha's opposition to his Motion to Compel Responses to Discovery prevented full development of the facts in this case, yet when the Superior Court denied that motion, Mr. Shimizu failed to seek review of the decision. His time for questioning that denial passed long ago and his comments regarding what the record would contain if the motion had been granted are purely speculation. Moreover, Shinchosha fully answered interrogatories concerning its business activities in California, visits by its employees to California, and all persons with whom it had engaged in any business activities while those persons were in California.

any possessory or financial interest in any Shinchosha publication distributed abroad.[2]

In the only evidence proferred by Mr. Shimizu on this point that was accepted by the Superior Court, Mr. Shimizu has alleged that someone acting on his behalf saw 45 copies of *Focus* and an undetermined number of other Shinchosha publications in a bookstore in Los Angeles.[3] (Superior Court Minute Order Attached to Petition as Exhibit A).

The Superior Court explicitly found that "only a few copies of FOCUS magazines reach California." Moreover, the Superior Court did not find that Shinchosha had in any way "purposefully avail[ed] itself of the privilege of conducting activities in [California]," *Hanson v. Denkla*, 357 U.S. 220, 223 (1958), other than by placing its publication in Japan into a "stream of commerce" originating in Japan: "defendant does business in Califor-

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[2]There is no evidence in the record to support Mr. Shimizu's assertion that "Focus magazine is Japan's 'National Inquirer,' and admittedly distributed to and read by the Japanese community world-wide." (Respondent's Opposition at 6).

[3]The declarations on which Mr. Shimizu has relied, from Ms. Inoue and Mr. Rikimaru, are largely based on telephone conversations. The declarants visited only one bookstore each and then telephoned other bookstores. Ms. Inoue did not even provide information about her ability to read Japanese. Defendant made timely objections to these declarations on the grounds that they were hearsay and lacked foundation. The Superior Court expressly limited its consideration of those declarations to statements about what the declarants had personally seen. (Exhibit A to Petition at 1, ¶3). Mr. Shimizu objected to Mr. Umeda's declaration on the grounds of hearsay, yet the Superior Court made no ruling upholding the objection and the Court relied on that declaration as well as Shinchosha's Response to Request for Admission Number Six, which both stated that no more than 40 copies of *Focus* are distributed in California.

nia in a broad manner, to wit, as a publisher it sells its product (albeit through intermediate distributors) in the usual stream of business manifested by the product reaching the penultimate destination, the book store." (Exhibit A to Petition at 1a).[4]

The "stream of commerce" argument that the Superior Court relied on in reaching its conclusion was precisely the issue that *Asahi Metal Industries v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), left unresolved. Contrary to Mr. Shimizu's assertions, *Asahi* is quite relevant to the jurisdiction determination in this case, even though it involves products liability and not libel.[5] Moreover, because the defendant in *Asahi*, like the defendant in this case, was located in Japan and not merely in another state, it has particular relevance in this case. This critical fact also diminishes the relevance of *Calder v. Jones*, 465 U.S. 783 (1983), and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), where the defendants were American publishers and editors, the allegedly defamatory publications were printed in English and were directed at a nationwide readership in the United States, and a "substantial number" of the publications were distributed in the forum state. *See Keeton*, 465 U.S. at 770-71, 780-81; *Calder*, 465 U.S. at 785.

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[4]Even assuming that there are 110 copies of *Focus* magazine present in California during any given week (as Mr. Shimizu asserts but not as the Superior Court found), or that there is some number of other Shinchosha publications present in California, there is no evidence to suggest that those additional copies of *Focus* or those other Shinchosha publications arrived in California either through some act of Shinchosha or through some act of the independent Japanese distributors who distribute Shinchosha publications.

[5]The distinction between jurisdiction cases that concern libel and those that concern products liability was rejected by this Court in *Calder v. Jones*, 465 U.S. 783, 790 (1983).

Because he ignores these differences, Mr. Shimizu never addresses the policy implications raised by a California court's assertion of jurisdiction over a Japanese defendant. He fails to consider the demands of international law and comity and treats this case as if it were simply a matter of "interstate federalism,"[6] in which there were no exceptional burdens imposed because of differences in language or culture, no effect on foreign trade or relations, and no problem regarding the enforceability of judgment if jurisdiction is found to be proper. These issues were what made *Asahi* worthy of this Court's attention and they are also what makes this case deserving of review.

II.

"Abuse of Discretion" Is Not The Proper Standard Of Review.

In those cases involving questions of personal jurisdiction over a defendant, this Court has always analyzed the lower court's decision for "error of law," and has never applied an "abuse of discretion" test. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773 (1983). Nevertheless, Mr. Shimizu introduces without citation the misleading notion that "abuse of discretion" is the correct standard for determining whether jurisdiction over Shinchosha meets the requirements of due process. This high level of deference finds no support in the case law and would be contrary to reason. The determination of whether jurisdiction over a particular defendant is proper implicates a Constitutional right that does not require deference to the discretion of a particular judge.

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[6] *World-Wide Volkswagen v. Woodson*, 444 U.S. 296, 293 (1980).

Mr. Shimizu's statement that the issue of jurisdiction over a nonresident is not a "federal issue" is equally without merit. A defendant's obligation to appear only before the court of a state where he has established "minimum contacts" is at the center of constitutional jurisprudence. Indeed, this Court's decisions to grant a writ of certiorari in both *Asahi* and *Calder*, which also questioned the constitutionality of a California court's jurisdiction over a nonresident, confirm that such issues are proper subjects for this Court's consideration.

III.

The Question Of Whether Minimum Contacts Exist Must Be Resolved At The Outset Of The Litigation To Insure Due Process.

To protect a defendant who lacks "minimum contacts" with the forum against having to defend himself in an improperly filed lawsuit, it is essential that courts resolve jurisdictional issues at the outset of a case. Mr. Shimizu argues that Shinchosha should be required to wait until there is a final judgment before it can seek review of this issue, yet such a requirement would subvert the very principles on which the concept of personal jurisdiction rests.

This Court stated in *World-Wide Volkswagen* that:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen, 444 U.S. at 292.

These two functions can only operate if the issue of jurisdiction is considered at the outset. Once the defendant has undergone the burden of defending himself through final judgment on the merits, the due process protection cannot be restored, and the state's overreaching cannot be corrected.

The burden imposed on a defendant by forcing him to come to a foreign jurisdiction to challenge jurisdiction is already quite significant. To add to that burden by requiring the defendant to wait until final judgment before seeking review would negate the protections intended by the "minimum contacts" test.

IV.

Imputing The California Activities of Independent Distributors to Shinchosha Destroys Defendant's Ability To Predict Where It Will Be Sued.

The "minimum contacts" test not only protects the defendant against shouldering the burden of a defense where jurisdiction is improper, it also lends a degree of predictability to litigation by "allow[ing] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Consequently, defendants can "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *Id.*

Similarly, the requirement that the defendant must have "purposefully avail[ed]" himself of the forum promotes predictability in litigation because it is then rea-

sonable to assume that the defendant should have foreseen that a court in that state would assert jurisdiction. Here, there is no evidence that Shinchosha "purposefully avail[ed] itself of the privilege of conducting activities in [California]," and thus it was not foreseeable that a California court would subject it to jurisdiction: seventy-five percent of the allegedly defamatory statements in the article in question concerned the non-California activities of a Japanese citizen; the article was printed in a Japanese-language magazine which is directed at an exclusively Japanese readership; only three of the sixteen independent distribution companies that distribute the magazine send any issues outside of Japan; of those issues sent outside Japan only 40 copies arrive in California each week; and finally, Shinchosha retains no control over nor financial interest in any of its publications distributed abroad.

Imputing the California activities of independent distribution companies to Shinchosha under these circumstances is therefore inconsistent with the goal of predictability. For Shinchosha to be held subject to general or even limited jurisdiction in California, based on the activities of those distribution companies, represents a departure from the "purposeful availment" requirement and lends a haphazard quality to the assertion of personal jurisdiction over alien defendants.

CONCLUSION

For the foregoing reasons and those stated in our Petition for Certiorari, we respectfully submit that the Court should grant a Writ of Certiorari to review the decision of the California Court of Appeal.

Respectfully Submitted,

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